



DLMP argues that the '170 patent is relevant prior art to the '978 patent and may invalidate the '978 patent. DLMP contends the subject matter of the two patents is sufficiently related that they should be tried in one suit.

MASS does not oppose intervention and assertion of the '170 patent for purposes of discovery and trial preparation, but argues the patents should not be tried together. MASS argues the two patents should be bifurcated for separate trials because otherwise the trial would be unnecessarily complicated and more complex for the jury.

Federal Rule of Civil Procedure 42(b) states:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

FED. R. CIV. P. 42(b). MASS argues that including the '170 patent in the trial of the '978 patent will unnecessarily complicate and confuse the jury. However, it is clear from DLMP's arguments that even if infringement of the '170 patent is not adjudicated in the same trial of the '978 patent, the '170 patent would still be at issue in the trial of the '978 patent as possibly invalidating prior art. If that is the case, adjudicating infringement of the '170 patent in a separate trial would not be "convenient" or "conducive to expedition and economy." Accordingly, the Court **GRANTS** the motion to intervene and **DENIES** without prejudice the request to bifurcate at this time. The Court is willing to reconsider the request prior to trial if MASS can show that bifurcation would be more convenient or conducive to expediting the case.

### **CONCLUSION**

The Court **GRANTS** DLMP's motion to intervene. The Court **ORDERS** the parties to

submit, within ten days of this Order, a proposed revised Docket Control Order with dates that will allow the '170 patent to be construed at the *Markman* hearing on November 29, 2007.

**So ORDERED and SIGNED this 11th day of May, 2007.**

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS  
UNITED STATES DISTRICT JUDGE**